Supreme Court, U.S.
FILED
JUN 6 2002
OFFICE OF THE CLERK

(3)

No. 01-1145

IN THE

Supreme Court of the United States

RITH ENERGY, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondent does not dispute that each of the questions stated in the petition (Pet. (i)) is properly presented for review. Nor does respondent dispute the accuracy of the facts stated in the petition. Respondent's attempts to harmonize the decision below with applicable decisions of this Court are unpersuasive.

Hodel v. Irving, 481 U.S. 704 (1987), and *Babbitt v. Youpee,* 519 U.S. 234 (1997), make clear that investment expectations, while a factor for consideration, is not a requirement in a partial takings case. Respondent attempts to justify the Federal Circuit's disregard of these decisions on the ground that (Br. Opp. 15, and n.*) this case, unlike those, involves the "highly regulated industry" of coal mining. This distinction, which the Federal Circuit did not adopt because it failed even to cite *Hodel* or *Babbitt*, is unsound. *Hodel* and *Babbitt* involved the property rights of Native Americans, which Congress has regulated for more than a century, *Hodel, supra,* 481 U.S. at 706-09, far longer than coal mining.

As respondent acknowledges (Br. Opp. 16), Rith Energy, Inc. ("Rith") was denied a mining permit not on the ground that it created any acid mine drainage ("AMD"), but because its mine posed an "unacceptable threat" of AMD. However, respondent does not dispute that this case involved the first and only time in the history of Tennessee mining when a permit was denied on that ground;[1] that numerous mines in Tennessee were granted permits despite the fact that they produced actual AMD; and that numerous other miners discharged actual AMD in violation of existing permits without suffering a permit suspension or

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[1] In the Trial Court Rith retained an expert who was familiar with mining in Tennessee (J.A. 315), but not nationwide. Rith's expert submitted a declaration stating that, to the best of his knowledge, no other permit ever was denied in Tennessee because of the mere threat, instead of the actuality, of AMD (J.A. 315-17). The Interior Department's Office of Surface Mining ("OSM") is familiar with mining nationwide. OSM not only failed to identify any miner in Tennessee banned from mining on the ground applied here, but any other miner anywhere else banned from mining on this ground. Thus it is undisputed on this record that Rith was prevented from mining on a ground never applied to any other miner before or since in the entire United States.

revocation. Nor does respondent dispute that Rith always complied with the stringent requirements of its NPDES permits and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* This case thus presents the question whether Rith's reasonable expectations can be defeated when a permit is denied on a ground which is unique and unforeseeable.

As respondent acknowledges (Br. Opp. 16-17), the Court of Appeals ruled that Rith's various *Penn Central*[2] arguments of unfairness and discrimination were irrelevant because OSM's permit denial was presumptively lawful. This holding disregards this Court's decisions making fairness a central issue in partial takings cases, and is untenable. A suit seeking just compensation for a taking presumes that the government's action is lawful. The issue in such a case is not whether the government acted lawfully, but whether the government's action caused a taking for which it must pay.[3] The Federal Circuit's holding that the presumption of lawfulness makes a *Penn Central* fairness inquiry irrelevant is far reaching and worthy of review. Under the Court of Appeals' ruling, almost no owner acquiring title after a regulatory scheme

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[2] *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978).

[3] Most takings cases come to court with either a presumption, or an express ruling, that an agency's refusal to allow the use of property was lawful. *E.g., Hodel v. Virginia Surface Mining & Reclamation Assn.,* 452 U.S. 264, 297, n. 40 (1981) (noting, after rejecting various constitutional challenges to a statute, that the owner remained free to assert an as applied takings claim). In *Penn Central* itself, this Court reviewed the various relevant factors to determine whether a taking had occurred, 438 U.S. at 124, 135-136, despite the fact that Penn Central had not sought judicial review of the agency's adverse rulings, and that the lower court had rejected a substantive Due Process argument, *id.* at 118-119, 121-122, and 132-133. If a property owner could have a prohibition set aside as unlawful, the owner could use its property and could not bring a regulatory takings case seeking just compensation.

is in place, and subject to a lawful application of the statute, could recover for a taking under *Penn Central*.[4]

Contrary to respondent's contention (Br. Opp. 13), a complete taking of property after the owner has received some economic benefit from it cannot be equated with a partial taking, which leaves the owner with substantial economic value. And, despite respondent's suggestion (Br. Opp. 17-18), the fact that Rith was able to make a profit before it was barred from mining cannot be dispositive in a *Penn Central* analysis. *See* Pet. 24-26.

Respectfully Submitted,

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[4] As noted in the Petition (at 21, n. 6), Tenn. Code Ann. § 66-5-101, provides that, absent a contrary intent, every grant of real estate gives the grantee the same property rights as its predecessors in the chain of title. This principle apparently is the law in every other State. *See Eagle, The 1997 Regulatory Takings Quartet: Retreating From The Rule Of Law*, 42 N.Y.L. Sch. L. Rev. 345, 391 and nn. 281-284 (1998). Property rights are defined by independent sources such as state law. *E.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992). Under § 66-5-101, Rith's expectations were conclusively reasonable as a matter of state property law, and should therefore be deemed reasonable under federal takings law. To the best of petitioner's knowledge, this Court has not addressed the impact of background principles of state law like § 66-5-101 upon the application of the *Penn Central* factors in a takings case.